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No. 05-465

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,
Petitioners

v.

SHIRLEY WILLIAMS, BALE PELFREY, BONNIE JONES, AND LORA SISSON, INDIVIDUALLY AND ON BEHALF OF A CLASS,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE IMMIGRATION POLITICAL ACTION COMMITTEE, U.S., INC., THE FEDERATION FOR AMERICAN IMMIGRATION REFORM, THE CENTER FOR AMERICAN UNITY, THE AMERICAN UNITY LEGAL DEFENSE FUND, NEGATIVE POPULATION GROWTH, INC. AND THE U.S. IMMIGRATION REFORM POLITICAL ACTION COMMITTEE, AS *AMICI CURIAE* SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether a defendant corporation and its agents can constitute an "enterprise" under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-1968 ("RICO"), in light of the settled rule that a RICO defendant must "conduct" or "participate in" the affairs of some larger enterprise and not just its own affairs.

TABLE OF CONTENTS

Table of Authorities iii

Interest of Amici Curiae 1

Statement of Context 3

Summary of Argument 9

Argument 11

I. RICO's Purpose, In This Circumstance, Is To Protect American Workers, Not to Promote Business Efficiency 11

II. Employers, Weighing Efficiency Against the Likelihood of Punishment Under Federal Law, Are Continuing to Hire Illegal Immigrants 16

III. Corporations Should Not Be Allowed to Fashion Their Own Contracts to Evade Congressional Intent 22

Conclusion 29

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INTEREST OF AMICI CURIAE

The purpose of this brief is to illustrate the enormous change in the immigration enforcement environment in the decade since Congress amended RICO to explicitly add alien smuggling, harboring and hiring as predicate crimes. Counsel for all parties have consented to the filing of amicus briefs in support of either party and their letters of consent have been lodged with the Clerk.[1]

Petitioner Mohawk Industries, Inc. ("Mohawk") emphasizes the possible impact of the decision below on "routine corporate" operations. *See, e.g.*, Pet'n, at 17 ("The rule [below] would, in effect, make a broad range of *routine* corporate conduct actionable under RICO.") (emphasis added). The several *amici* who filed briefs in support of Petitioner similarly emphasize the "routine" nature of Mohawk's conduct. "Mohawk has done nothing more than conduct a *routine* and essential business task." Brief of the National Association of Manufacturers, *et alia*, as *Amici Curiae* in Support of Petitioner ("NAM *Amici* Br."), at 7 (emphasis added).

Amici filing this brief believe that the "routine" behavior alleged in this case was intended by Congress to be illegal, and that Congress amended RICO in 1996 to cover precisely this "routine" behavior. *Amici* believe this case offers the Court an opportunity to protect RICO's purposes and fulfill Congressional intent to protect American workers.

The Immigration Political Action Committee ("ImmPAC") is a federal political action committee,

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[1]Pursuant to Rule 37.6, *Amici* certify that no person or entity other than *Amici* made a monetary contribution to the preparation and submission of this brief, and that no counsel to a party authored this brief in whole or in part.

organized in 1983. ImmPAC's principal purpose is to support enforcement of the immigration laws. ImmPAC was a strong supporter of the 1986 Immigration Reform and Control Act ("IRCA"), Pub. L. No. 99-603, which prohibited hiring an unauthorized alien. 8 U.S.C. § 1324a. ImmPAC was also a strong supporter of Cong. Peter King's and Patrick Kennedy's amendment adding alien harboring, smuggling and hiring to the list of RICO predicate crimes.[2] This provision, now 18 U.S.C. § 1961(1)(F), is the basis for the RICO claim at issue in this action.

U.S., Inc., is a Michigan charitable corporation concerned, *inter alia*, about immigration and its effects on American workers. U.S. publishes a magazine and website on this and related topics. www.thesocialcontract.com.

The Federation for American Immigration Reform is a national, nonprofit membership organization of concerned citizens who share a common belief that American immigration policies must be reformed to serve the national interest. www.fairus.org. FAIR was a major proponent of the 1986 enactment of the prohibition against hiring illegal immigrants.

The Center for American Unity is a national, non-profit educational organization dedicated to preserving Americans' historical unity. www.cfau.org. The American Unity Legal Defense Fund is a national, non-profit public interest law firm established in 2001 to defend human and civil rights, including the rights of American workers who are faced with

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[2]This provision, which originally passed the House as Section 7 of the Criminal Alien Detention Improvement Act of 1995, 141 CONG. REC. 588 (daily ed. Feb. 10, 1995), became Title IV, Subtitle D, Section 434 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 214.

displacement by illegal immigrant workers. www.americanunity.org.

Negative Population Growth, Inc., is a national membership organization founded in 1972 to educate the American public and political leaders about the detrimental effects of overpopulation on our environment, resources and quality of life. www.npg.org. NPG has long supported strong enforcement of the immigration laws.

The U.S. Immigration Reform Political Action Committee, an independent federal political action committee, supports effective worksite immigration law enforcement as essential to deter illegal immigration. www.usirp.com.

STATEMENT OF CONTEXT

> [Christopher] *Walters stated that in approximately March 1997, due to an INS worksite operation conducted on several Wal-Mart stores located in the St. Louis area, Wal-Mart fired IMC* [Walter's company] *as a cleaning contractor. Walters stated that Mr. Leroy Schuetz, then Division Vice-President, Operations Branch at Wal-Mart Headquarters, informed him that IMC was fired because they used illegal aliens as their cleaning crews. . . . Walters further stated that Schuetz told him to create different companies if he [Walters] wanted to do business with Wal-Mart again. Schuetz explained that if Walters created different companies and if one company was fired for employing illegal aliens, Walters could continue to do business with Wal-Mart through other companies.*

This statement, from a federal affidavit unsealed in November 2005,[3] captures the three major themes of this case:

- businesses' relentless drive for efficiencies, including a search for lower-cost and compliant workers;
- federal law's absolute prohibition on the use of illegal immigrants as workers; and
- many businesses' attempts to evade these prohibitions, by using subcontractors or simply ignoring federal law.

Each of these themes is discussed below, but none can be understood without reference to an overwhelming and overarching factor: the collapse of worksite immigration law enforcement in the ten years since Congress amended RICO to include hiring illegal immigrants as a predicate crime. Since 1996, enforcement of federal immigration law in the workplace has essentially ceased.

In the Immigration Reform and Control Act of 1986, Congress prohibited the hiring of unauthorized aliens ("employer sanctions"). 8 U.S.C. § 1324a.

> As we have previously noted, IRCA "forcefully" made combating the employment of illegal aliens central to "[t]he policy of immigration law." *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194, and n. 8, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991). It did so by establishing an extensive

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[3]Affidavit of Patricia M. Mullin, Acting Special Agent in Charge of the United States Immigration and Customs Enforcement ("Mullin Aff."), *attached* to Application and Affidavit for Search Warrant, *In the Matter of the Search of David Glass Drive Technology Center, Wal-Mart Corporation*, Case Number FA-03-23, filed October 22, 2003, U.S. District for the Western District of Arkansas, at 41-42, available at: www.walmartjanitors.com/staticdata/Exhibit_A_to_SAC.pdf.

> "employment verification system," § 1324a(a)(1), designed to deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States, § 1324a(h)(3).

Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 147-48 (2002).

Employer sanctions have never been successful, largely because they have never been enforced. "[E]nforcement of employer sanctions has been beset by difficulty from the start." H. Rep. No. 104-469, at 129. "Hundreds of thousands of aliens unauthorized to work in the United States have used fraudulent documents to circumvent the process designed to prevent employers from hiring them. In many instances, employers are complicit in this activity." U.S. General Accounting Office, *Homeland Security: Challenges to Implementing the Immigration Interior Enforcement Strategy*, April 10, 2003, GAO-03-660T, 5-6.

Public officials continue to criticize the hiring of illegal immigrants. "We've got to crack down on employers who flout our laws." "President Signs Homeland Security Appropriations Act for 2006," Oct 2005, 4, www.whitehouse.gov/news/releases/2005/10/20051018-2.html.

Nevertheless, the reality of worksite immigration enforcement is substantially different from the rhetoric:

> The worksite enforcement program is one of various ICE [U.S. Bureau of Immigration and Customs Enforcement] immigration enforcement programs, and has been a relatively low priority. Since fiscal year 1999, the number of notices of intent to fine issued to employers for violations of IRCA [8

U.S.C. § 1324a] and the number of administrative worksite arrests have *declined*. . .

U.S. Government Accountability Office, *Immigration Enforcement: Weaknesses Hinder Employment Verification and Worksite Enforcement Efforts*, ("*Immigration Enforcement*"), August 2005, GAO-05-813, at 30 (emphasis added).

GAO's bland language masks the true extent of the "decline[]." Since the 1996 RICO amendments, there has been a "decline" of 99.1% in workplace arrests for violations of the prohibitions on hiring illegal immigrants, and a "decline" of 99.7% in issuance of penalties to employers.

Simply put, employer sanctions enforcement has collapsed in the last ten years. Here are the actual workplace immigration law enforcement statistics since the 1996 RICO amendments:

Fiscal Year	Worksite Arrests	Notices of Intent to Fine
1997	17,554	865
1998	13,914	1,023
1999	2,849	417
2000	953	178
2001	735	100
2002	485	53
2003	445	162
2004	159	3

Fiscal Year	Worksite Arrests	Notices of Intent to Fine
2005 (7 months)	81	N/A

1997-98 data: U.S. Dept. of Homeland Security, *2003 Yearbook of Immigration Statistics*, Sept. 2004, Table 39. 1999-2005 data: *Immigration Enforcement, supra*, 35, 36, Figures 4 and 5.

This collapse has been public knowledge for several years. Louis Uchitelle, "I.N.S. Is Looking the Other Way As Illegal Immigrants Fill Jobs," *The New York Times*, March 9, 2000, C1, col. 1, http://select.nytimes.com/gst/abstract.html?res=FB0E1FFE345C0C7A8CDDAA0894D8404482.

Employers are apparently taking advantage of the opportunity to preferentially hire illegal immigrants. "A startling new study[4] shows that all of the growth in the employed population in the United States over the past few years can be attributed to recently arrived immigrants." Bob Herbert, "Who's Getting the New Jobs," *The New York Times*, July 23, 2004, A23, col. 6, http://select.nytimes.com/gst/abstract.html?res=F60D10FF3D590C708EDDAE0894DC404482.

This study found that "new immigrants have . . . *captured all of the net gains in employment* over the past four years." University Communications and Public Relations, "New Report Reveals Nation's Growing Dependence on Foreign

[4]Sum, Fogg, Khatiwada and Palma, "Foreign Immigration and the Labor Force of the U.S.," Center for Labor Market Studies, Northeastern University, www.nupr.neu.edu/7-04/immigrant_04.pdf.

Immigrants Since 2000," Northeastern University, July 23, 2004, 1 (emphasis added), www.nupr.neu.edu/7-04/immigration_july04.shtml.

In other words, "all of the net" new American jobs are going to "new immigrants,"[5] many of them illegally present in the United States. This job "capture" has changed the composition of the American workforce: "One of every seven people working in the United States in 2004 was born elsewhere; a decade earlier, only one in ten workers was foreign born." Congressional Budget Office, *The Role of Immigrants in the U.S. Labor Market*, ("CBO Study"), November 2005, Preface.

This job "capture" has also decreased the wages paid to native-born workers. "[Professor George J.] Borjas [of Harvard University] calculated that the average weekly earnings of native-born men as a group would be reduced by 3 percent to 4 percent," CBO Study, *supra*, 23, *citing*, George J. Borjas, "The Labor Demand Curve *Is* Downward Sloping: Re-examining the Impact of Immigration on the Labor Market.," 18 *Quarterly Journal of Economics*, no. 4 (2003), pp. 1335-1374.

The impact of this job transference is not equally shared: "Those most affected by the influx of new immigrant workers are young, less well-educated American workers and so-called established immigrants, those who have been in the

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[5]The authors differentiated immigrants only by length of time in the United States, not by legal status, although they acknowledge that many immigrants in their study were illegally present in the United States. *Id.*, n. 13. The most recent estimates suggest that half of all "new immigrants" are illegal immigrants. Steven Cammarota, *Immigrants at Mid-Decade: A Snapshot of America's Foreign-Born Population in 2005*, Center for Immigration Studies, December 2005, http://www.cis.org/articles/2005/back1405.html

U.S. for a number of years." Herbert, *supra*. Professor Borjas notes that "high school dropouts" would experience the "largest adverse impact [on wages] . . . about nine percent lower than they would be in the absence of increased competition from foreign-born workers." CBO Study, *supra*, 23-24.

An even greater shift toward "new immigrants" in the workforce is expected in the future. CBO Study, *supra*, 25 ("future labor force growth is likely to be largely the result of immigration.")

This is the modern immigration law environment. Any claim that corporations must be allowed to engage in "routine and essential business task[s], hiring employees", NAM *Amici* Br., 7, must take into account the current environment in which corporations face no risk of federal enforcement of the prohibitions against hiring illegal immigrants, and some apparently consider violating immigration law as "routine."

SUMMARY OF ARGUMENT

Petitioner argues that RICO should not harm economic efficiency, but RICO's purpose, in these circumstances, is to protect American workers. Congress amended both the immigration laws and RICO in 1996 to insure that employers who knowingly hired illegal immigrants were subject to the heightened penalties and civil liability of RICO. Whatever focus RICO had on traditional organized crime "families" in the past, at least after 1996, Congress explicitly intended RICO to be used on immigration crimes. Economic efficiency does not seem to play a role in this post-1996 RICO focus.

RICO's new role in stopping immigration-related crime is particularly important in light of the collapse of federal worksite law enforcement. Numerous instances

across the country demonstrate that employers are continuing to hire illegal immigrants in clear and knowing violation of federal law. In the highly-publicized Wal-Mart Stores, Inc., case, the use of illegal immigrant workers continued even after the company entered into a federal consent decree promising not to do so. The many cases coming to the courts indicate that Wal-Mart is not alone in knowingly, willfully and repeatedly hiring illegal immigrants, using subcontractors or otherwise.

In light of the collapse of worksite immigration law enforcement, Petitioner's request to exempt corporations from potential RICO liability should be seen for what it is: a request to avoid any realistic threat of enforcement, governmental or civil, for hiring illegal immigrants.

Nor should the definition of "enterprise" be allowed to insulate corporations from RICO coverage. This Court's precedents indicate that RICO enterprises can involve corporations and their employees, even those conducting the corporation's own business, if they have separate legal rights and responsibilities. There is no logical reason to exempt the use of contracts executed with third-party outsourcing contractors from that rule. The contracts and an alleged course of conduct in executing responsibilities under those arrangements should be sufficient to show both legal separateness and the other RICO enterprise requirements.

Despite Petitioner's concerns, it has the keys to safety in its inventory already. As shown in the business media, all employers need to do to avoid RICO liability under the post-1996 amendments is educate and manage both their employees and their contractors to avoid knowingly hiring illegal immigrants. Both RICO and the immigration laws provide sufficient protection of legitimate businesses from any realistic threat. But Petitioner asks for more, so much

more that it threatens the integrated structure Congress erected in 1996. Petitioner is asking for the right to do by contract what Congress forbid it to do directly.

ARGUMENT

I. RICO's Purpose, In This Circumstance, Is To Protect American Workers, Not to Promote Business Efficiency.

The Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, added Chapter 96 to Title 18 of the United States Code, entitled Racketeer Influenced and Corrupt Organizations ("RICO"). 18 U.S.C. §§ 1961-1968; *U.S. v. Turkette*, 452 U.S. 576, 577-78 (1981). "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 498 (1985); *Russello v. United States*, 464 U.S. 16, 26-29 (1983). One of the purposes of RICO was "the need to protect the public from those who would run 'organization[s] in a manner detrimental to the public interest.'" *Cedric Kushner Promotions, Ltd., v. King*, 533 U.S. 156, 165, *citing* S.Rep. No. 91-617, at 82 (1969). Similarly, RICO "protects the public against those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed.'" *Id.*, *citing National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994).

Only certain predicate crimes trigger the application of RICO. 18 U.S.C. § 1961(1). Congress was aware in 1996 that employer sanctions were not effective in stopping employers from hiring illegal immigrants. H. Rep. 104-469, at 129 (1995). In 1996, Congress amended the list of RICO predicate crimes to include "any act which is indictable under the Immigration and Nationality Act, section 274 [8 U.S.C. §

1324] (relating to bringing in and harboring certain aliens) . . . if the act . . . was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F). That same year, Section 274 was expanded to include multiple hiring of illegal immigrants. 8 U.S.C. § 1324(a)(3)(A), Pub.L. 104-208, Div. C, Title II, § 203(b)(4). Thus, Congress intended an integrated structure for applying RICO to the organized hiring of illegal immigrants.

Though presented as a RICO claim, this case involves allegations of multiple violations of the immigration laws.[6] Petitioner Mohawk and supporting *amici* prefer to address only "a routine and essential business task, hiring employees." NAM *Amici* Br., 7. Indeed, Petitioner has rewritten the Question Presented in its Opening Brief to highlight just this distinction: "Whether a defendant corporation and its agents *engaged in ordinary, arms-length dealings* . . ." Pet. Br. at *i (emphasis added).

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[6]As noted by the court below, this case comes to the Court on a Rule 12(b)(6) Motion to Dismiss, and all well-pled facts must be accepted as pled. 411 F.3d 1252, 1255 n. 1. There is, as yet, no finding that Mohawk actually engaged in "hundreds, even thousands, of violations of federal immigration laws." 411 F.3d at 1257.

Nevertheless, Petitioner's and supporting *amici*'s attacks on Respondents' "exceedingly thin" allegations, Pet. Br., 7, misunderstand the federal "notice pleading" system. *See, e.g., Swierkiwicz v. Sorema, N.A.* 534 U.S.506, 512-13 (2002) (pleading need only give defendant fair notice of the plaintiff's claim and the grounds upon which it rests). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). As many of the courts below have suggested, discovery and other proceedings may uncover exactly the information which Petitioner and supporting *amici* claim RICO requires for proof.

Petitioner and supporting *amici* argue that RICO's purpose is solely to address "gangs and organized crime families," or "mob famil[ies]," Pet. Br. 4, 25, and is not intended to "undermine corporate decisions to contract out certain business functions rather than hire employees to perform them in-house." Brief *Amici Curiae* of the Chamber of Commerce of the United States of America, *et alia* ("Chamber *Amici* Br."), 21.

The danger asserted by Petitioners and supporting *amici* is that the "court's holding [below] creates incentives for corporations to internalize more functions and hire more employees, leading to possibly less efficient and competitive operations. . . These incentives have no relationship to preventing the type of abuse for which RICO was designed." Chamber *Amici* Br., 23.

RICO, however, does not appear to be concerned with efficiency, at least when it comes to immigration predicate crimes. It could be more efficient for a business to smuggle and hire illegal immigrant workers, who, as shown above, work for lower wages and depress the wages of native workers. And it could also be more efficient for a business to use subcontractors to hire illegal immigrants who are then "loaned" to the business, as alleged here. 314 F.Supp.2d at 1340.

Nevertheless, each of those acts is prohibited by federal law. As shown above, employer sanctions prevents the hiring of unauthorized aliens, even if they are the most efficient workforce available. 8 U.S.C. § 1324a. In 1996, the same year it amended the RICO predicate acts, Congress expanded the prohibitions against harboring and smuggling aliens to include repeated hiring of unauthorized aliens. 8 U.S.C. § 1324(a)(3)(A).

Efficiency is not the purpose of these prohibitions. As this Court has long recognized, a "primary purpose in restricting immigration is to preserve jobs for American workers." *I.N.S. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 (1991); *Sure-Tan, Inc.v. NLRB*, 467 U.S. 883 (1984).

The RICO sections at issue in this case incorporate the immigration laws' purpose of protecting American workers. As amended by Congress, RICO's purpose was to protect American workers (and not coincidentally, the immigrants themselves) from employers who would break the laws for profit. The 1996 RICO amendment was, in fact, specific to protecting against exploitation of smuggled illegal immigrants. As the sponsors of this amendment noted:

> In the past couple of years we have heard about boatloads of Chinese immigrants being brought to the United States under horrifying conditions – weeks with no clean water, minimal food, and unsanitary conditions beyond imagination. The gangs responsible for smuggling these people into the United States then force them into slave labor, working 12- to 14-hour days, 7 days a week in gruesome conditions just to pay off the $30,000 to $40,000 debt they incurred. These horrible abuses at the hands of people willing to profit from the trade of human beings must be stopped.
>
> The purpose of this provision is to address the problem of slave trade, where traffickers use the dream of America and freedom to lure people into the bondage of slavery for their own profit.

141 CONG. REC. H1590 (Feb. 10, 1995) (Statement of Cong. Kennedy).

Though Cong. Kennedy's language may be hyperbolic and may not apply to any parties to this case,[7] the sponsor's statement indicates that Congress's purpose was to stop an odious practice, and not to recognize concerns about efficiency in hiring. Just as Congress believed that employer sanctions would remove a magnet for illegal immigration, Congress believed that using RICO remedies to stop the employment of illegal immigrants would also help stop the "horrifying conditions" to which the immigrants may have been subject. In this case, if the allegations are correct, Mohawk and its subcontractors were at least complicit in the practices which Congress intended RICO to be used to stop.

To adopt Petitioner's formulation of RICO's purpose would vitiate Congress's express purpose in amending that law to stop practices which it deemed particularly objectionable, substituting a generalized sentiment in favor of business freedom and efficiency. Thus, Petitioner's and supporting *amici*'s position that the decision below would create "incentives for corporations to internalize more functions and hire more employees, leading to possibly less efficient and competitive operations. . . These incentives

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[7]Sadly, some of the claims in the various Wal-Mart-related cases involve present-day charges strikingly similar to those which sparked congressional action ten years ago; for example, illegal immigrant workers were being locked inside stores at night against their will, though the defense was that this was for security reasons. *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 334-35 (D.N.J. 2005). Similar abuses are reported regularly around the country. *See, e.g.*, Elissa Silverman, "Pay Fight in Tech's Trenches; Day Laborers for a Verizon Subcontractor Say They were Cheated," *The Washington Post*, Feb. 16, 2006, D1, col. 2 (cable construction workers not paid).

have no relationship to preventing the type of abuse for which RICO was designed," Chamber *Amici* Br., 23, is not supported by the text or history of RICO. The abuses alleged in this case are precisely those Congress had in mind when it amended both the immigration laws and RICO in 1996.

II. Employers, Weighing Efficiency Against the Likelihood of Punishment Under Federal Law, Are Continuing to Hire Illegal Immigrants:

Employers know that they are unlikely to suffer adverse consequences from hiring illegal immigrants. The lower cost and uncomplaining illegal immigrant labor pool gives employers a huge economic incentive to break the immigration laws. As a result, major, high-profile employers repeatedly and knowingly hire illegal immigrants, and conspire with outside contractors to do so.

The most significant recent example is Wal-Mart Stores, Inc.[8] Federal officials tout the recent consent decree entered against Wal-Mart Stores, Inc.,[9] and several

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[8]The 2001 indictment of Tyson's Foods might also be considered significant. *See, Trollinger v. Tyson's Foods, Inc.*, 370 F.3d 602, 606 (6th Cir. 2004).

[9]Many of the allegations raised against Wal-Mart Stores are set forth in a District Court opinion, which, in part, dismissed without prejudice RICO claims filed by some of the illegal immigrant workers who allegedly were involved in the case. *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295, 300-311 (D.N.J. 2005). Judge Greenaway denied the RICO claims, in part, because the complaint did not allege that Wal-Mart had actual knowledge that the aliens were brought into the United States in violation of law. *Id.*, 393 F.Supp.2d at 309. After the Mullin affidavit, *supra*, was unsealed last November, the plaintiffs in *Zavala* submitted a Second Amended Complaint with more allegations about Wal-Mart's

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contractors who conspired with Wal-Mart executives to hire illegal immigrants as "the two most significant enforcement actions taken by the United States in the field of immigration employment sanctions since the laws prohibiting employment of illegal aliens were first enacted in 1986."[10]

This announcement, however, illustrates much more, including how a major corporation knowingly, willfully and repeatedly hired illegal immigrants even after being prosecuted. The investigation was triggered in 1998, by a hit-and-run accident in Honesdale, Pennsylvania.[11] A license plate, left at the scene, *id.*, led local law enforcement officials to investigate whether illegal immigrants were working at a local Wal-Mart store.[12] Finally, in 2001, federal agents raided Wal-Mart stores in Pennsylvania, New York, Ohio and Missouri, and arrested approximately 100 illegal immigrants. ICE News Release, *supra*.

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[9](...continued)
actual knowledge that its subcontractors were hiring illegal immigrants. www.walmartjanitors.com/staticdata/Second_Amended_Complaint.pdf.

[10]Office of Public Affairs, U.S. Immigration and Customs Enforcement, "Wal-Mart Stores, Inc. Agrees to Pay a Record $11 Million to ICE to Settle Nationwide Worksite Enforcement Investigation" ("ICE News Release"), March 18, 2005, 1, http://www.ice.gov/graphics/news/newsreleases/articles/walmart031805.htm.

[11]Michael Barbero, "Wal-Mart to Pay $11 Million," *The Washington Post*, March 19, 2005, B1, http://www.washingtonpost.com/ac2/wp-dyn/A48612-2005Mar18?language=printer.

[12]Chris Strohm, "DHS Calls on Corporations to Come Clean on Hiring Illegal Immigrants," *GovExec.com Daily Briefing*, March 18, 2005, www.govexec.com/story_page.cfm?articleid=30800.

Nevertheless, Wal-Mart continued using contractors who hired illegal immigrants. On October 23, 2003, ICE agents arrested approximately 245 illegal immigrant workers at some 60 Wal-Mart stores in 21 states. *Id.*

Wal-Mart executives first denied knowing that their contractors and stores were using illegal immigrant workers, but further investigation revealed that "recorded conversations of unidentified Wal-Mart executives, managers and contractors showed that immigration violations 'continued to occur with direct knowledge by the Wal-Mart corporation.'"[13]

As the Mullin affidavit quoted above indicates, not only were Wal-Mart executives knowledgeable about the hiring of illegal immigrants by subcontractors, but they encouraged and directed them to do so. "Schuetz explained that if Walters created different companies and if one company was fired for employing illegal aliens, Walters could continue to do business with Wal-Mart through other companies." Mullin Aff., *supra*, at 42.

Incredibly, even prosecution and the consent decree do not appear to have deterred Wal-Mart executives.[14] Only

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[13]Jerry Seper, "Wal-Mart Pays $11 Million to Settle Alien Case," *The Washington Times*, March 19, 2005, www.washingtontimes.com/function/print.php?StoryID=20050318-104421-2951r.

[14]These limited prosecutions involved only a total of about 345 illegal immigrant workers out of a Wal-Mart domestic workforce of 1,200,000 workers. Associated Press, "Wal-Mart Mops Up Immigrant Flap," CBS News.com, March 18, 2005, www.cbsnews.com/stories/2005/03/18/national/printable681593.shtml. And the fine is an insignificant financial event for the world's largest retailer. "[F]or Wal-Mart, which made $289 billion in retail sales last

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seven months after the touted consent decree, Wal-Mart again was caught using hundreds of illegal immigrants, in Pennsylvania and North Dakota.[15]

The Wal-Mart case is not before this Court, although a RICO claim by former employees is pending in the District of New Jersey. *Zavala v. Wal-Mart Stores, Inc.*, 393 F.Supp.2d 295 (D.N.J. 2005). The Wal-Mart case, however, illustrates the dangers inherent in the approach proposed by Petitioner and supporting *amici*. Over a number of years, Wal-Mart Stores engaged in a variety of tactics with its contractors to hire and utilize illegal immigrants, even after entering a consent decree promising not to do so. Wal-Mart allegedly hired legal workers only until it was considered "safe" to hire illegal workers again.[16] These tactics were approved and managed by corporate executives who initially denied they were breaking the law.

Of course, most American companies do not knowingly hire illegal immigrant workers. Yet the allegations in the several other similar cases in the circuit courts discussed in the briefs here indicate that the Wal-Mart case is

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[14](...continued)
year, it will take about 16 hours of sales to pay it off." Seper, *supra*.

[15]Michael Rubinkam, "Raid at Wal-Mart Site Yields Arrests of 125 Illegal Immigrants," *The Miami Herald*, Nov. 19, 2005, http://www.miami.com/mld/miamiherald/business/national/13205837.htm ?template=contentModules/printstory.jsp.

[16] *See, e.g., Mattus v. Facility Solutions, Inc.* ___ F.Supp.2d ___, (D.N.J., No. Civ. 05-0863 (DRD), Nov. 21, 2005), slip op., *3, 2005 WL 3132190 (former employees of Wal-Mart cleaning contractor allege that the store and its contractor "allegedly conspired to 'disguis[e] [Wal-Mart's] use of illegal immigrant labor by quickly and temporarily hiring legal workers until it was deemed safe to hire cheap, illegal labor again.").

not an isolated or aberrant instance. Employers in various regions of the country apparently routinely and intentionally hire illegal immigrant workers. *See, e.g., Baker v. IBP, Inc.*, 357 F.3d 685, 686-87 (7th Cir. 2004), *cert. denied*, 543 U.S. 956 (2004) (allegations that "about half of the employees at IBP's Joslin meatpacking plant are aliens who cannot work lawfully in the United States and that IBP not only knows in a statistical sense that many of its workers lack the sort of visas that authorize working here but also can identify which ones they are, yet winks at obviously fake green cards and other spurious credentials."); *Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc.*, 271 F.3d 374, 379 (2d Cir. 2001) (janitorial company which did not hire illegal immigrants sued competitor which had been prosecuted for hiring hundreds of illegal immigrants); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002)(alleging widespread hiring of illegal immigrant farm workers); *Trollinger*, 370 F.3d at 606 (employees' suit followed federal indictment of Tyson's Foods, Inc., for conspiracy to smuggle aliens into the United States and hiring illegal immigrants at 15 plants in nine states).[17]

This is the form of business arrangement which Petitioner and supporting *Amici* seek to have the Court shield under an absolute protection from RICO enforcement. NAM *Amici* Br., 14. *Amici*, for example, contend that permitting a RICO suit in this circumstance would "allow[] plaintiffs to

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[17]As noted above, n. 6, many of these claims are only allegations in pleadings, but this Court has ample evidence that hiring of illegal immigrants is both widespread and "routine" today. *See, Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed.2d 271 (2002) (those without work authorization do not receive the same benefits under the NRLA as persons whose employment is lawful); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984).

use a statutory tool designed to prevent the misuse of organizations and eradicate organized crime against corporations that have simply adapted to the economic realities of doing business in the Twenty-First Century global economy." *Id.*

As shown above, the "economic realities" are simply a vanishingly-small chance of being caught hiring illegal immigrants, and the "design[]" of RICO was recently amended to specifically include the hiring of illegal immigrants. Thus, if the purpose of RICO is to "protect the public from those who would run 'organization[s] in a manner detrimental to the public interest.'" *Cedric Kushner Promotions,* 533 U.S. at 165, or to "protect[] the public against those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed,'" *id., amici*'s description seems incomplete.

Despite the many euphemisms surrounding the hiring of illegal immigrants, the act of hiring itself has been a federal crime for twenty years. The prohibitions against such hiring are central to the policy of immigration law. *National Center for Immigrants' Rights,* 502 U.S. at 194, and n. 8.

This is not a case of plaintiffs over-reaching, using a statute outside Congress's intention. In *Sedima,* for example, this Court noted complaints that RICO had become something different from its roots, but said that any defect was for Congress to remedy. 473 U.S. at 499-500. Here, on the other hand, Congress wanted RICO used in these circumstances, and expressly amended RICO, after *Sedima,* to cover just this circumstance. 141 CONG. REC. H1590 (Feb. 10, 1995) (Statement of Cong. Kennedy).

Congress recognized "the need to protect the public from those who would run 'organization[s] in a manner

detrimental to the public interest.'" *Cedric Kushner Promotions, Ltd.*, 533 U.S. at 165. Congress intended to cover those who would hire illegal immigrants. In other words, Congress amended RICO to protect American workers.

RICO is not just to be enforced by federal authorities. Congress enacted a specific form of private remedy for RICO violations, over the vociferous objections of those who thought it would be used for "malicious harassment." *Sedima*, 473 U.S. at 487-88. These private remedies are particularly important where there is no governmental law enforcement. Given the immense problem posed by the collapse of federal worksite immigration law enforcement, this Court should avoid disabling this limited remaining protection for American workers.

The Court must be realistic about what is being asked of it. Petitioner's and supporting *amici*'s request to be shielded simply "because American businesses increasingly rely on independent agents and contractors in carrying out routine commercial activities," NAM *Amici* Br. 9, should be seen for what it is: a request for this Court's blessing to routinely engage in a federal crime without fear of enforcement activity, governmental or private.

III. Corporations Should Not Be Allowed to Fashion Their Own Contracts to Evade Congressional Intent:

The question in this case is whether a corporation and its agents can constitute an "enterprise" under RICO. Restated under the facts alleged in this case, the question is whether Mohawk Industries, its employees, and its outside, third-party contractors were functioning as an "enterprise" to recruit, hire, transport, and conceal illegal immigrants. For example, did Mohawk's agreement with contractor

Temporary Placement Services ("TPS"), a wholly-separate legal entity which recruited and employed illegal immigrants and "loan[ed] these workers to" Mohawk "for a fee," 314 F.Supp.2d at 1340, constitute an "enterprise?"

RICO makes it unlawful "for any person employed by or associated with any *enterprise* engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (emphasis added). The term "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

An "association in fact" form of "enterprise" has no specific requirements as to form or composition. "There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." *Turkette*, 452 U.S. at 580. "The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." *Id.*, 452 U.S. at 583. An association in fact enterprise is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.*

In this case, the allegations, unchallenged at this procedural stage, seem to indicate that Mohawk and its contractors associated together for the common purpose of engaging in a course of conduct of procuring, supplying, recruiting and hiring illegal immigrants – a RICO predicate crime. The purpose of these extensive efforts was allegedly to profit from a lower-cost and more docile workforce. This

seems like the sort of "gang" which Cong. Kennedy intended to cover with the 1996 RICO amendment.

For example, the allegations indicate that TPS recruited illegal immigrants, hired them, contracted with Mohawk over a period of time for the employees' "loan," and that Mohawk negotiated the contract, paid for and managed the "loan" of the workers. 314 F.Supp.2d at 1340. This arrangement seemed to "function as a continuing unit." *Turkette*, 452 U.S. at 583. TPS stayed in business and Mohawk got low-cost, non-complaining workers.

Mohawk allegedly also had different arrangements with other employment contractors and its own employees, including providing housing for the illegal immigrant workers, travel to the Brownsville, Texas, area to recruit illegal immigrant workers, and incentive payments for successful recruiting. 411 F.3d at 1255-56. Mohawk allegedly destroyed documents and assisted illegal immigrant workers to evade detection. 411 F.3d at 1255. Again, these seem like the type of activities Congress intended to cover in 1996.

Petitioner and supporting *amici* make much of the word "individual" in the text of the statute as arguably not including corporations or associations in fact which count corporations as members. *See, e.g.*, Pet. Br., 12-26. This argument, however, is not consistent with this Court's precedents.

This Court recently unanimously found an "enterprise" consisting of a corporation and its sole employee/shareholder, who was conducting the affairs of the corporation within the scope of his authority as the corporation's employee. *Cedric Kushner Promotions*, 533 U.S. at 160. This Court found that the employee was

"distinct" from the enterprise, and that the RICO provision applied. *Id.*

The Court said that the test under RICO was whether "the person and the victim, or the person and tool, are different entities, not the same." 533 U.S. at 162. "The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more 'separateness' than that." 533 U.S. at 162-63. Again, *Kushner* clearly looks at an arrangement which includes a corporation.

The Court noted that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or *whom it employs*." *Id.*, 533 U.S. at 163 (emphasis added). This distinction was consistent with RICO's basic purposes: to protect a legitimate enterprise from those who would use unlawful acts to victimize it and to protect the public from those who would use an enterprise as a vehicle to conduct unlawful acts. 533 U.S. at 164, *citing, Turkette*, 452 U.S. at 591, and *Nat'l Org. For Women*, 510 U.S. at 259.

The Court said that a "corporate employee who conducts the corporation's affairs through an unlawful RICO 'pattern . . . of activity,' [18 U.S.C.] § 1962(c)," uses that corporation as a "vehicle." *Id.* The Court focused its analysis on the need "to protect the public from those who would run 'organization[s] in a manner detrimental to the public interest.' S. Rep. No. 91-617, at 82." *Id.*, at 165.

The objection raised in *Kushner* is identical to that raised in this case: that a corporation can only act through its directors, officers, and agents. *Id.* The Court, however, found

its analysis consistent with that principle. "It does not deny that a corporation acts through its employees; it says only that the corporation and its employees are not legally identical." 533 U.S. at 166.

Petitioner does not suggest how the "enterprise" in *Kushner*, which includes a corporation, would fare under its proposed reformulation of "enterprise" which would exclude corporations.[18] In this case, the only distinction is whether the *Kushner* "not legally identical" analysis should move beyond employees who act for the corporation to third-parties who perform corporate acts by contract. "Because more and more corporations rely on outside recruiting firms and staffing agencies to supply necessary labor, a rule that enables plaintiffs to plead an association-in-fact enterprise solely because a defendant corporation contracted with an independent service agent will result in an increase in the number of businesses exposed to RICO liability." NAM *Amici* Br., at 14.

Leaving aside the fact that Mohawk allegedly did far more than simply hire (including recruit and conceal), Mohawk cannot argue that it has the identical legal status of its contractor TPS, even though TPS was, by contract, its agent. They are separate entities, with separate legal rights, which they chose to adjust by contract between themselves. If they were prosecuted for violating the immigration laws,

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[18]Nor does Petitioner address how its proposed insulation of corporations from RICO would capture "people willing to profit from the trade of human beings,"141 CONG. REC. H1590 (Feb. 10, 1995), if those "gangs," *ibid*, were to include a corporation in their "enterprise." The immigration laws are intended to prohibit businesses from employing large numbers of illegal immigrants; indeed, that was the whole point of the 1996 amendment to include multiple hiring in the older smuggling and harboring prohibition. 8 U.S.C. § 1324(a)(3)(A).

Mohawk and TPS could be convicted on different predicates. TPS, for example, could be convicted of hiring and then "loaning" unauthorized aliens wholly apart from any conviction for Mohawk; the distinction might be that TPS knew the aliens were unauthorized while Mohawk had no actual knowledge, and thus could not be convicted under either the multiple hiring prohibition at issue here, or the contractor anti-abuse provision in employer sanctions. 8 U.S.C. 1324(a)(3), 1324a(a)(4).

Indeed, under the *Kushner* analysis, the contract itself should be *prima facie* evidence that there are two separate and distinct entities which chose to adjust their rights and responsibilities between them. They are "legally different," "not legally identical." *Kushner*, 533 U.S. at 163, 166. "And we can find nothing in the statute that requires more 'separateness' than that." 533 U.S. at 163.

Despite *amici*'s protests about modern business practices, they do not argue that modern practices have put an end to contracts. Indeed, what they claim to seek as the highest expression of this Court's action are "economically efficient and mutually beneficial contracts with third-party service providers." NAM *Amici* Br., at 21.

What Petitioner is requesting, then, is the ability to fashion its own contractual arrangements to avoid liability for hiring illegal immigrants. What it could not do directly, it seeks to do by contract.

What is critical about this contractual relationship is that Congress anticipated just this defense by those who would seek to hire illegal immigrants. IRCA provides not just liability for those who hire unauthorized aliens directly, but also for those who use contractors to do so. 8 U.S.C. § 1324a(a)(4). Otherwise, employer sanctions would be undercut by contractual arrangements to shift the criminal

exposure to middlemen. Whether or not this type of arrangement was actually followed by Mohawk and its contractors, Congress clearly intended to foreclose an avenue to evade employer sanctions by contract.

The same principle is applicable to the RICO "enterprise" issue as well. This Court should not place the keys to enforcement in the hands of those with an incentive to violate the law. Without federal enforcement, employers will fashion their arrangements to avoid any hint of private civil liability.

The converse is also true: a decision recognizing potential legal liability would strongly encourage businesses to abide by the law. Such a decision would simply recognize the structure Congress crafted in 1996 to protect American workers using the RICO remedies. Given the absence of federal worksite immigration law enforcement, allowing private civil suits under RICO might be the only remaining form of immigration law enforcement. This prospect is what concerns Petitioner and supporting *amici*.

Ironically, however, the path to safety is not difficult, even if it is not "efficient." All corporations need do to avoid RICO claims is to train and manage their employees to avoid hiring illegal immigrants, and to require in those enticing third-party outsourcing contracts that their contractors do so as well. Just as news about the failure of worksite immigration law enforcement has been publicized, so has this practical remedy. "In all likelihood, employers will be forced to counter this new assault by exploring proactive dialogue with their vendors to establish the type of policies, contract terms and communications that can be used as evidence that

the employer and staffing agencies are doing everything possible to abide by the law."[19]

The key to this protection for employers is in the employer sanctions requirements that employment be "knowing," 8 U.S.C. § 1324a(a)(1)(A), or without verifying an applicant's eligibility to accept employment in the U.S. 8 U.S.C. § 1324a(a)(1)(B). The procedural protections for employers in these requirements are extensive, which is one reason why so few employers have been prosecuted. The burdens of such verification are substantially lessened by new technology. This simple attempt to abide by the 1986 law would likely remove the corporations from the ambit of RICO without disturbing the purposes of the 1996 amendments.

Thus, the Court should recognize and reaffirm the *Kushner* analysis in the context of hiring illegal immigrants.

CONCLUSION

Amici therefore respectfully urge the Court to affirm the decision below.

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[19] Donald W. Benson and Jamie E. Kitces, "New Wave or Flash Flood: 11th Circuit Allows RICO/Immigration Lawsuit to Proceed," *Findlaw Library*, Aug. 24, 2005, *reprinted* at http://library.findlaw.com/2005/Aug/24/194505.html.